

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

GREGORY FLETCHER

Plaintiff,

v.

c/o QUIN et. al.,

Defendants.

Case No.: 15-cv-2156-GPC-NLS

**REPORT AND
RECOMMENDATION FOR ORDER:
(1) GRANTING DEFENDANTS'
MOTION TO DISMISS; (2)
DISMISSING THE CLAIMS WITH
LEAVE TO AMEND; AND (3)
EXTENDING THE TIME TO
EFFECT SERVICE UNDER FED. R.
CIV. P. 4(m)**

(Dkt. No. 22)

Gregory Fletcher ("Plaintiff"), an inmate proceeding pro se, filed this civil rights action pursuant to 42 U.S.C. § 1983. Pending before the Court is Defendant G. Galvan's ("Galvan") and F. Quinn's ("Quinn") Motion to Dismiss for Failure to State a Claim under Fed. R. Civ. P. 12(b)(6). Plaintiff did not file an Opposition. For the reasons explained below, the Court **RECOMMENDS** that Defendants' motion be **GRANTED**, that Plaintiff's claims be **DISMISSED WITH LEAVE TO AMEND**, that Plaintiff be **GRANTED** an extension of time to effect service, and that service be directed through

1 the Deputy Attorney General.

2 **I. Factual Allegations and Procedural Background¹**

3 On September 24, 2015, Plaintiff filed a complaint that the Court dismissed for
4 failure to pay filing fees. On December 8, 2015, Plaintiff filed the operative First
5 Amended Complaint. (Dkt. No. 6.)

6 In his First Amended Complaint, Plaintiff alleges three counts against eight prison
7 officials employed at the Richard J. Donovan Correctional Facility in San Diego,
8 California. (Id. at 2.) First, Plaintiff alleges that on or about September 9, 2014, Officer
9 Romero physically pushed him multiple times, and that both Officer Romero and Officer
10 Grisson failed to summon medical care for his broken thumb, a result of that physical
11 incident. (Id.) Plaintiff alleges that Officer Romero and Officer Grisson then told him that
12 “no one mess[es] with” Officers Romero, Grisson, and Galvan. (Id.) Plaintiff further
13 alleges that these officers, including Galvan, “are part of the Greenwall Officer Mafia
14 Group,” are dangerous, corrupt, and cover up murders and beatings. (Id.)

15 Second, Plaintiff alleges claims of sexual assault and battery against Officer Lopez,
16 and that Lopez denied his right to medical care. (Id. at 4.) Plaintiff also alleges that on
17 September 24, 2015, Sergeant Stricklin signed a false statement concerning Plaintiff’s
18 allegations against Lopez. (Id.)

19 Third, Plaintiff alleges various claims against Captain Sanchez, which he labels as
20 cruel and unusual punishment and denial of his First Amendment rights of free speech
21 and freedom of religion. (Id. at 5.) Plaintiff claims he submitted a petition for a writ of
22 Habeas Corpus to the U.S. or State Supreme Court, in which he disclosed assertions of
23 murder and conspiracy to commit murder against numerous officers. (Id.) Plaintiff
24 alleges that Captain Sanchez, Lieutenant Williams, and Officer Quinn “wanted [Plaintiff]
25 dead.” (Id.)

26 Plaintiff requests an injunction or restraining order against all defendants, along
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28 ¹ These factual allegations are taken from Plaintiff’s operative First Amended Complaint.

1 with monetary damages.

2 On May 9, 2016, defendants Galvan, Quinn, and Sanchez filed the presently
3 pending Motion to Dismiss. They move to dismiss Galvan and Quinn from this case on
4 the ground that Plaintiff fails to state a claim against them.² Plaintiff did not file an
5 opposition to the motion, and the Court took the matter under submission.

6 Based on a review of docket, the other defendants—Lopez, Romero, Stricklin,
7 Grisson, and Sorzano—have not yet been served, and the time permitted to do so under
8 Fed. R. Civ. P. 4(m) expired on or about May 3, 2016. Plaintiff filed a notice with the
9 Court regarding his attempts to serve the remaining defendants. (*See* Dkt. No. 24.)

10 II. Legal Standard

11 Federal Rule of Civil Procedure 12(b)(6) permits a party to assert, by motion, the
12 defense that the opposing party failed “to state a claim upon which relief can be granted.”
13 Fed. R. Civ. P. 12(b)(6). Every complaint must contain “a short and plain statement of the
14 claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). Detailed
15 factual allegations are not required, but “[t]hreadbare recitals of the elements of a cause
16 of action, supported by mere conclusory statements, do not suffice.” *Ashcroft v. Iqbal*,
17 556 U.S. 662, 678 (2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555
18 (2007)). “When there are well-pleaded factual allegations, a court should assume their
19 veracity, and then determine whether they plausibly give rise to an entitlement to relief.”
20 *Id.* at 679. “Determining whether a complaint states a plausible claim for relief [is] . . . a
21 context-specific task that requires the reviewing court to draw on its judicial experience
22 and common sense.” *Id.* The “mere possibility of misconduct” falls short of meeting this
23 plausibility standard. *Id.*; *see also Moss v. U.S. Secret Service*, 572 F.3d 962, 969 (9th
24 Cir. 2009).

25 While a plaintiff’s factual allegations are taken as true, courts “are not required to
26 indulge unwarranted inferences.” *Doe I v. Wal-Mart Stores, Inc.*, 572 F.3d 677, 681 (9th
27

28 ² Defendants do not move to dismiss the claims against Sanchez.

1 Cir. 2009) (internal quotation marks and citation omitted). Indeed, while courts have an
 2 “obligation . . . where the petitioner is pro se, particularly in civil rights cases, to construe
 3 the pleadings liberally and to afford the petitioner the benefit of any doubt,” *Hebbe v.*
 4 *Pliler*, 627 F.3d 338, 342 & n.7 (9th Cir. 2010) (citing *Bretz v. Kelman*, 773 F.2d 1026,
 5 1027 n.1 (9th Cir. 1985)) (internal quotations omitted), it may not “supply essential
 6 elements of claims that were not initially pled.” *Ivey v. Board of Regents of the University*
 7 *of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982). Even before *Iqbal*, “[v]ague and conclusory
 8 allegations of official participation in civil rights violations” were not “sufficient to
 9 withstand a motion to dismiss.” *Id.*

10 **III. Discussion**

11 **a. Plaintiff’s Claim Against Officer G. Galvan**

12 Defendant Galvan argues that Plaintiff fails to state a claim against him. (Dkt. No.
 13 22-1 at 23.) Plaintiff’s first count is an Eighth Amendment claim for failure-to-protect
 14 and deliberate indifference to medical needs. (Dkt. No. 6 at 3.) Galvan contends that
 15 Plaintiff fails to state a claim upon which relief can be granted because Plaintiff fails to
 16 allege the personal involvement of Galvan in the underlying event. (Dkt. No. 22-1 at 3.)

17 The Eighth Amendment prohibits inflicting cruel and unusual punishments and
 18 “embodies broad and idealistic concepts of dignity, civilized standards, humanity and
 19 decency.” *Estelle v. Gamble*, 429 U.S. 97, 102 (1976) (citation and internal quotations
 20 omitted). To violate the Eighth Amendment, “a prison official must have a sufficiently
 21 culpable state of mind.” *Farmer v. Brennan*, 511 U.S. 825, 834 (1994) (citations and
 22 internal quotations omitted). “[T]o show an Eighth Amendment violation a prisoner must
 23 typically show that a defendant acted, not just negligently, but with ‘deliberate
 24 indifference.’” *Minneeci v. Pollard*, 132 S. Ct. 617, 625 (2012). Moreover, to establish
 25 liability under section 1983, the plaintiff must show personal participation by the prison
 26 official. *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989).

27 **i. Failure-to-Protect Claim**

28 Plaintiff alleges that Officer Romero physically harmed him by pushing and

1 punching him, and that both Officer Romero and Officer Grisson failed to stop the
2 continued attack.³ (Dkt No. 6 at 3.) Plaintiff also alleges that Romero and Grisson told
3 him that nobody messes with them and Officer Galvan. (Id.) Plaintiff claims that all of
4 these officers “are part of the Greenwall Officer Mafia Group,” are dangerous and
5 corrupt, and “have covered up murders and beatings.” (Id.)

6 “Prison officials have a duty to take reasonable steps to protect inmates from
7 physical abuse.” *Hoptowit v. Ray*, 682 F.2d 1237, 1250 (9th Cir. 1982). To establish an
8 Eighth Amendment claim on failure to protect, the prisoner must show that prison
9 officials were “deliberately indifferen[t]” to serious threats to the inmate’s safety. *See*
10 *Farmer*, 511 U.S. at 834. To establish deliberate indifference to a serious threat to the
11 inmate’s safety, the prisoner must demonstrate that “the official [knew] of and
12 disregard[ed] an excessive risk to inmate . . . safety; the official must both be aware of
13 facts from which the inference could be drawn that a substantial risk of serious harm
14 exists, and [the official] must also draw the inference.” *Id.* at 837. Accordingly, a
15 showing of lack of knowledge of the risk may preclude a prison official from liability. *Id.*
16 at 844.

17 Plaintiff fails to assert sufficient facts indicating that Galvan violated Plaintiff’s
18 Eighth Amendment rights by failing to protect him from physical abuse. Plaintiff alleges
19 no facts showing that Galvan knew of and disregarded an excessive risk to Plaintiff’s
20 safety. (Dkt. No. 6 at 3.) Plaintiff does not allege that Galvan was present at the scene in
21 which his injury took place, nor does he allege that Galvan had reason to know of the
22 physical confrontation that occurred. (Dkt. No. 6 at 3.) The conclusory allegations that
23 Galvan is dangerous, corrupt, covers up murders and beatings, and is part of the
24 Greenwall Officer Mafia Group without further factual basis is insufficient to state a
25 claim for relief. *See Ashcroft*, 556 U.S. at 678 (holding that a complaint that offers labels,
26

27 ³ The Court notes Defendants interpreted Plaintiff’s failure-to-protect claim as alleging that Romero and
28 Grisson failed to protect Plaintiff from an attack by another inmate. (*See* Dkt. No. 22-1 at 2.) Either way,
Plaintiff’s allegations as currently pled do not implicate Galvan in the underlying event.

1 conclusions, and naked assertions “devoid of ‘further factual enhancement’” will not
2 overcome a motion to dismiss) (quoting *Twombly*, 550 U.S. at 557).

3 Plaintiff’s allegation that two other officers told him not to mess with Galvan
4 similarly fails to state a claim for relief. Again, Plaintiff’s assertion does not relate to the
5 failure-to-protect claim, as it does not allege any personal acts or omissions by Galvan.
6 *See Ashcroft*, 556 U.S. at 678 (“a complaint must contain sufficient factual matter,
7 accepted as true . . . that allows the court to draw the reasonable inference that the
8 defendant is liable for the misconduct alleged”). Plaintiff’s bare assertions and
9 conclusions fail to state a failure-to-protect claim against Galvan for which relief can be
10 granted under Federal Rule of Civil Procedure 8(a).

11 **ii. Deliberate Indifference to Medical Needs Claim**

12 Plaintiff alleges that as a result of the physical attack by Officer Romero, Plaintiff
13 broke his thumb and told Officers Romero and Grisson that he needed medical attention.
14 (Dkt. No. 6 at 3.) He claims that in response, Romero and Grisson told him that “they
15 didn’t care if [Plaintiff] died” and that he would not receive medical attention. (Id.)
16 Plaintiff alleges that Romero and Grisson added: “no one mess[es] with [Romero],
17 Grisson, Galvan, Sorrano [and inmate] King,” and that all of these officers “are part of
18 the Greenwall Officer Mafia Group.” (Id.) Plaintiff also claims that Galvan is dangerous
19 and corrupt, and has “covered up murders and beatings.” (Id.)

20 “Denial of medical attention to prisoners constitutes an [E]ighth [A]mendment
21 violation if the denial amounts to deliberate indifference to serious medical needs of the
22 prisoners.” *Toussaint v. McCarthy*, 801 F.2d 1080, 1111 (9th Cir. 1986). To establish
23 deliberate indifference to medical needs, the plaintiff must show “(a) a purposeful act or
24 failure to respond to a prisoner’s pain or possible medical need and (b) harm caused by
25 the indifference.” *Wilhelm v. Rotman*, 680 F.3d 1113, 1122 (9th Cir. 2012). “A ‘serious’
26 medical need exists if the failure to treat a prisoner’s condition could result in further
27 significant injury or the ‘unnecessary and wanton infliction of pain.’” *McGuckin v. Smith*,
28 974 F.2d 1050, 1059 (9th Cir. 1992) (quoting *Estelle*, 429 U.S. at 104). Factors for

1 consideration are whether a reasonable doctor would believe the condition warrants
2 addressing, whether the condition significantly impacts the prisoner's daily activities, and
3 whether the condition is chronic and substantially painful. *See Lopez v. Smith*, 203 F.3d
4 1122, 1131-32 (9th Cir. 2000) (en banc); *Doty v. City of Lassen*, 37 F.3d 540, 546 n.3
5 (9th Cir. 1994) (citing *McGuckin*, 974 F.2d at 1059-60).

6 While Plaintiff sufficiently alleges a serious medical injury (*see Jett v. Penner*, 439
7 F.3d 1091, 1096 (9th Cir. 2006) (holding that a fractured thumb constitutes a serious
8 medical condition)), he fails to adequately allege a claim that Galvan acted deliberately
9 indifferent to his medical needs. Plaintiff alleges no facts suggesting that Galvan knew of
10 his medical condition or purposely failed to respond to his medical needs. (Dkt No. 6 at
11 3.) The claim that other officers told Plaintiff he would not receive medical attention does
12 not sufficiently state a claim against Galvan for deliberate indifference to medical needs.
13 *See Ashcroft*, 556 U.S. at 678 (holding that the plaintiff must allege facts indicating
14 "more than a sheer possibility that a defendant has acted unlawfully" to state a claim for
15 which relief can be granted); *Taylor v. List*, 880 F.2d 1040, 1055 (9th Cir. 1989)
16 (requiring personal participation by a prison official to establish liability under section
17 1983). Plaintiff does not allege sufficient actions or omissions by Galvan to state an
18 Eighth Amendment claim against him.

19 **b. Plaintiff's Claim Against Officer F. Quinn**

20 Defendant Quinn argues that Plaintiff's third count fails to assert a claim against
21 him for which relief can be granted. (Dkt. No. 22-1 at 4.) Plaintiff describes his third
22 count as containing claims for cruel and unusual punishment, and violation of his
23 freedom of religion, freedom of speech, and freedom of association. (Dkt. No. 6 at 5.) In
24 support of this count, Plaintiff alleges Captain Sanchez "lock[ed] [him] up for no reason,
25 prevented him from speaking to anybody, and expressed indifference to his religion. (Id.)
26 Plaintiff claims that he petitioned for a writ of Habeas Corpus, disclosing "murder,
27 conspiracy to commit murder," and Sanchez's engagement in sexual relations in
28 exchange for leverage in the department. (Id.) Plaintiff next alleges that Sanchez,

1 Williams, and Quinn “wanted [him] dead.” (Id.)

2 A prison official deprives a prisoner of a constitutional right “within the meaning
3 of section 1983, ‘if he does an affirmative act, participates in another’s affirmative act, or
4 omits to perform an act which he is legally required to do that causes the deprivation of
5 which complaint is made.’” *Preschooler II v. Clark Cty. Sch. Bd. of Trs.*, 479 F.3d 1175,
6 1183 (9th Cir. 2007) (quoting *Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir. 1978). “A
7 plaintiff must demonstrate that the official was the ‘moving force,’” and “the actual and
8 proximate cause of the deprivation of the plaintiff’s constitutional rights.” *Valencia v.*
9 *Ruiz*, 2016 U.S. Dist. LEXIS 69427, at *24 (E.D. Cal. May 26, 2016) (citing *Leer v.*
10 *Murphy*, 844 F.2d 628, 634 (9th Cir. 1988)).

11 Although Plaintiff does not label it as such, his allegations appear to suggest a
12 retaliation claim against Sanchez. It is unclear whether Plaintiff also alleges such a claim
13 against the other defendants. A retaliation claim in a prison context consists of five
14 elements: “(1) An assertion that a state actor took some adverse action against an inmate
15 (2) because of (3) that prisoner’s protected conduct, and that such action (4) chilled the
16 inmate’s exercise of his First Amendment rights, and (5) the action did not reasonably
17 advance a legitimate correctional goal.” *Rhodes v. Robinson*, 408 F.3d 559, 567-68 (9th
18 Cir. 2005); *see also Watison v. Carter*, 668 F.3d 1108, 1114 (9th Cir. 2012). “[P]urely
19 retaliatory actions taken against a prisoner for having exercised [First Amendment] rights
20 . . . violate the Constitution.” *Rhodes*, 408 F.3d at 567.

21 Here, Plaintiff only provides factual allegations against Sanchez in support of his
22 third count. He does not allege sufficient factual detail to state a claim against Quinn for
23 which relief can be granted. Indeed, Plaintiff does not allege any act or omission by
24 Quinn; he only states that Quinn “wanted [him] dead” without further factual detail. (Dkt.
25 No. 6 at 5.) This bare assertion and conclusory statement without any factual support will
26 not withstand a motion to dismiss under Rule 12(b)(6). *See Ashcroft*, 556 U.S. at 678.
27 Plaintiff fails to tie any action or omission by Quinn to the deprivation of Plaintiff’s
28 rights. (Dkt. No. 6 at 5.) While Plaintiff’s alleged petition for a writ of Habeas Corpus is

constitutionally protected conduct (*see Brodheim v. Cry*, 584 F.3d 1262, 1269 (9th Cir. 2009)), Plaintiff fails to allege facts indicating any adverse action taken by Quinn (Dkt. No. 6 at 5.) If Plaintiff is attempting to make a retaliation claim, he fails to sufficiently link Quinn to his retaliation claim. (*Id.*) Plaintiff thus does not sufficiently state a claim against Quinn under Fed. R. Civ. P. 8(a).

c. Leave to Amend

A pro se litigant must be given leave to amend his complaint unless it is “absolutely clear” the deficiencies of the complaint cannot be cured by amendment. *Lucas v. Dep’t of Corr.*, 66 F.3d 245, 248 (9th Cir. 1995). “Under Ninth Circuit case law, district courts are only required to grant leave to amend if a complaint can possibly be saved. Courts are not required to grant leave to amend if a complaint lacks merit entirely.” *Lopez v. Smith*, 203 F.3d 1122, 1129 (9th Cir. 2000).

This Court recommends Plaintiff be granted an opportunity to amend his complaint to address the deficiencies as noted in this report. If Plaintiff chooses to amend his complaint, Plaintiff should be notified that he must specifically state what each named defendant did that deprived him of his constitutional or other federal rights. To state a cognizable claim, Plaintiff must plead facts as to each named defendant sufficient to raise a right to relief above the speculative level. *Twombly*, 550 U.S. at 555.

d. Extension of Time to Effect Service

The Court previously directed the U.S. Marshal to effect service on Plaintiff’s behalf. (Dkt. No. 11 at 5, citing 28 U.S.C. § 1915(d); Fed. R. Civ. P. 4(c)(3).) On or about April 5, 2016, the U.S. Marshal returned the unexecuted summons and complaint as to defendants Lopez, Romero, Stricklin, Grisson, and Sorrano because the litigation coordinator was unable to identify these individuals without their first initials. (Dkt. Nos. 13-18.)

On May 12, 2016, Plaintiff constructively filed a letter describing and identifying each unserved defendant according to the limited information available to him. (*See id.* at 2.) Plaintiff claims these individuals would not give him their first initials, but that

1 Sorrano (or perhaps spelled Sorranno or Sorreano) and Grisson were assigned to B-
 2 Facility, Building 8 in 2014 and 2015. (Id.) He further identifies that Romero was
 3 assigned to C-Facility, and Stricklin (or perhaps spelled Strickland or Striclin) was a
 4 Sergeant at B-Facility. (Id.) Plaintiff also emphasizes that he identified Lopez's first
 5 initial as "M" various times in his complaint. (Id.)

6 "At the plaintiff's request, the court may order that service be made by a United
 7 States marshal or deputy marshal." Fed. R. Civ. P. 4(c)(3). Rule 4 of the Federal Rules of
 8 Civil Procedures further provides that:

9 If a defendant is not served within 90 days after the complaint is filed, the
 10 court—on motion or on its own after notice to the plaintiff—must dismiss
 11 the action without prejudice against that defendant or order that service be
 12 made within a specified time. But if the plaintiff shows good cause for the
 failure, the court must extend the time for service for an appropriate period.

13 Fed. R. Civ. P. 4(m). The court enjoys broad discretion under Rule 4(m) to extend time
 14 for service, even without a showing of good cause. *In re Sheehan*, 253 F.3d 507, 513 (9th
 15 Cir. 2001); *Mann v. American Airlines*, 324 F.3d 1088, 1090 (9th Cir. 2003) (holding that
 16 district court may, under the broad discretion granted by Fed. R. Civ. P. 4(m), extend
 17 time for service retroactively after the service period has expired).

18 Given that this Court recommends Plaintiff be provided leave to amend his
 19 complaint, this Court also recommends granting Plaintiff an extension of time to serve
 20 the un-served parties with the summons and complaint should Plaintiff include those
 21 parties in his amended complaint. It appears the only reason the U.S. Marshal was unable
 22 to effect service on these defendants is because Plaintiff could not identify their first
 23 initials. (Dkt. No. 24, at 3.)

24 The Deputy Attorney General assigned to this case should contact the Litigation
 25 Coordinator at RJD. The Deputy Attorney General should provide the Litigation
 26 Coordinator with the description and identifying information contained in Plaintiff's
 27 letter to U.S. Marshal Deputy or Clerk, P. Smith (*see* Dkt. No. 24), for the purpose of
 28 ascertaining the first initials of the unserved defendants. The Deputy Attorney General

1 should then provide the U.S Marshal, in a confidential memorandum if necessary, the
 2 first initials of defendants Lopez, Romero, Stricklin, Grisson, and Sorrano, presuming the
 3 Litigation Coordinator is able to identify them using the information from Plaintiff's
 4 letter. (*See id.*) The memorandum should instruct that the information is to be used for
 5 purposes of service only.

6 **IV. Conclusion**

7 For the forgoing reasons, the Court **RECOMMENDS** that:

- 8 1. Defendants' motion to dismiss for failure to state a claim be **GRANTED**;
- 9 2. The claims against Galvan and Quinn be dismissed **WITH LEAVE TO**
 10 **AMEND**;
- 11 3. Plaintiff be **GRANTED** an extension of time under Fed. R. Civ. P. 4(m) as
 12 to the un-served parties; and
- 13 4. For service of the summons and any amended complaint to be re-directed
 14 through the Deputy Attorney General assigned to this case as to the unserved
 15 defendants.

16 This report and recommendation is submitted to the United States District Judge assigned
 17 to this case pursuant to 28 U.S.C. § 636(b)(1).

18 **IT IS ORDERED** that no later than **July 21, 2016**, any party to this action may
 19 file written objections and serve a copy on all parties. The document should be captioned
 20 "Objections to Report and Recommendation."

21 **IT IS FURTHER ORDERED** that any reply to the objections must be filed and
 22 served on all parties no later than **August 4, 2016**.

23 **IT IS SO ORDERED.**

24 Dated: July 7, 2016



25 Hon. Nita L. Stormes
 26 United States Magistrate Judge
 27
 28